No. 80-2032

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

AMERICAN LAW ASSOCIATION,
an unincorporated association,

PETITIONER,

vs.

JOHN MERKEL, in his capacity as United States Attorney for the Western District of Washington, BENJAMIN CIVILETTI, in his capacity as Attorney General of the United States; DAVID BEITZ, in his capacity as Assistant U.S. Attorney; JEROME KURTZ, in his capacity as Commissioner of the Internal Revenue Service; ARTURO JACOBS, in his capacity as Seattle District Director of the Internal Revenue Service; DANIEL C. BROWN, DONALD JENSEN, RONALD F. PERRON, RON LANG, REGINALD NORBERG, in their capacity as Special Agents for the Internal Revenue Service, and the UNITED STATES of AMERICA.

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the denial of a motion to quash subpoenas is dismissable as moot on appeal where the grand jury investigation is ongoing and the material subpoenaed would disclose confidential membership lists and financial information of an association in violation of its First Amendment Rights.

2. Whether the allegation of a government prosecutor that certain officers of an association "may" have committed tax crimes is sufficient to require production by grand jury subpoenas of confidential membership lists and financial information of the association held by third party banks.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i.
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	9
1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE "CAPABLE OF REPETITION YET EVADING REVIEW" EXCEPTION TO THE MOOTNESS DOCTRINE APPLICABLE IN THIS MATTER	9
2. THE DECISION BELOW ERRED IN DECIDING A SIGNIFICANT CONSTITUTIONAL QUESTION IN HOLDING THAT THE GOVERNMENT SUBPOENAS IN THIS MATTER DEMANDING CONFIDENTIAL ASSOCIATION MEMBERSHIP AND FINANCIAL INFORMATION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS	16
CONCLUSION	24
APPENDIX A	1A
APPENDIX B	1B

TABLE OF AUTHORITIES

	Page
CASES:	
Branzburg v. Hayes, 408 U.S. 665 (1972)....	18
Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972)	19,20,21,23
Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978)	20
Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539 (1963)	16,20
In re Special April 1977 Grand Jury (Scott), 581 F.2d 589 (7th Cir. 1978)	10,11,12,13,14
NAACP v. Alabama, 357 U.S. 449 (1958)	17,18
NAACP v. Button, 371 U.S. 415 (1963) ...	16
Pollard v. Roberts, 283 F.Supp. 248 (E.D. Ark. 1968), aff'd per curiam, 393 U.S. 14 (1968)	18,20
Securities & Exchange Com'n v. Laird, 598 F.2d 1162 (9th Cir. 1979)	10,12
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)	10
United States v. Arthur Andersen & Co., 623 F.2d 725 (1st Cir. 1980)	13
United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980)	21,22
United States v. Deak-Perera International, Banking Corp., 610 F.2d 89 (2d Cir. 1979) ...	15
United States v. Silva and Silva Accountancy Corp., 47 AFTR 2d 81-1270 (9th Cir. No. 80-5497, March 20, 1981)	15
Weinstein v. Bradford, 423 U.S. 147 (1975) ...	10,11

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, AMERCIAN LAW ASSOCIATION, respectfully prays the court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 4, 1981.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit dismissing the appeal as being moot is unreported, but is set forth in Appendix A herein.

The Order of the United States District Court for the Western District of Washington is unreported, but is set forth in Appendix B herein.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on February 4, 1981, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment of the United States Constitution:

> "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

1. DISTRICT COURT JURISDICTION.

District Court jurisdiction was invoked by virtue of 28 U.S.C. § 1331(a), as a federal question arose under the First Amendment of the United States Constitution and involved the United States and its officers in their official capacities.

2. STATEMENT OF FACTS.

The Petitioner, the American Law Association (hereinafter the "ALA" or the "Association") is an unincorporated association with headquarters in Bryan, Texas. The purpose of the ALA is to disseminate information to private citizens regarding their rights under the laws of the United States, particularly the Internal Revenue Code and Tax Treaties as they pertain to individual income taxation. (CR 2a)[1].

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[1] All record references refer to the Clerk's Record (CR) as docketed by the United States District Court for the Western District of Washington. Relevant portions of this record were before the Court of Appeals by Appellant's Excerpt of Record and as attachments to Appellant's Memorandum in Opposition to Appellees' Motion to Dismiss Appeal. The official trial court record was never transmitted to the Court of Appeals due to the dismissal on the grounds of mootness.

The ALA has several hundred members, all U.S. citizens who have joined together to exchange information on these subjects. (CR 2a). The ALA holds membership meeetings, annual conventions, and publishes a monthly newsletter. (CR 2a). Membership lists, minutes of meetings, and other information disseminated by the ALA as well as its financial status and funding sources are confidential as the ALA and its individual members have long feared interference and harassment by the Internal Revenue Service owing to the nature and purpose of the organization. (CR 2a).

This fear is actual and not imagined. Members of the ALA have been harassed and audited by the IRS apparently based solely on their affiliation with the ALA. (CR 2c, 2d, 2e and 2f). This government harassment, prompted by the refusal of ALA members to answer questions about the ALA or to disclose the names of other ALA members, is documented in uncontraverted affidavits. (CR 2c, 2d, 2e and 2f).

In early March, 1980, a federal grand jury convened in the Western District of Washington sub-

poenaed bank records concerning the ALA requesting "signature cards" and "statements of account". The district court denied Petitioner's request to enjoin these subpoenas in holding that no information concerning membership of the ALA would be disclosed. (CR 8). The hearing on Petitioner's request was held before a Magistrate whose Report and Recommendation was adopted by the court without further hearing. (CR 6).

Emboldened by this decision, the government served new subpoenas returnable May 6, 1980 on the same banks seeking "cancelled checks, deposit slips and items of deposit" for accounts held by certain principals in the ALA. (CR 11). It is uncontraverted that the subpoenaed material would reveal membership and confidential financial information of the ALA. (CR 2a, 11, 17). It is also uncontraverted that disclosure of the membership lists of the ALA would cause irreparable harm to the ALA and chill its First Amendment rights. (CR 2a, 11, 17).

The Petitioner again objected to this second string of subpoenas. It requested the district court

quash any subpoenas revealing membership and confidential financial information concerning the ALA. By agreement of government counsel, the return date of the challenged subpoenas was delayed to June 3, 1980 to allow time for hearing and decision by the district court.

In support of its need for this information, the government presented one affidavit of a government attorney. (CR 20). In this affidavit, the government averred that the grand jury investigation was focused on certain ALA principals and alleged that these principals "may have committed specific crimes." (CR 20, Par. 2). The government opined that the subpoenaed material was "necessary for the grand jury to determine whether there is evidence that subjects of the investigation may have committed crimes." (CR 20, Par. 3).

Hearing was again held before a magistrate on May 16, 1980. Petitioner's request for a hearing before the judge was denied. The district court adopted the Magistrate's Report and Recommendation denying the motion to quash on May 29, 1980.

(CR 33). Government attorneys refused to further extend the return date of the subpoenas to allow review of the district court's decision.

Petitioner immediately appealed the district court's decision to the Ninth Circuit Court of Appeals with a simultaneous motion to the district court to enjoin enforcement of the subpoenas pending appeal. (CR 36,37, 38,39). The motion was denied by the district court on June 2, 1980.

A similar motion thereafter presented to a single judge of the Ninth Court sitting in Seattle was also denied on June 2, 1980. When Petitioner discovered one bank in Texas had not timely complied with its subpoena, an Emergency Motion for Reconsideration was thereafter presented to a three judge panel of the Ninth Circuit in San Francisco and was denied on June 12, 1980.

The banks to whom the subpoenas were issued were compelled to produce the information requested, including that information disclosing membership and confidential financial records of the ALA.

Meanwhile, the grand jury investigation continued (and it is Petitioner's belief it continues today). In its response to the Association's request for stay pending appeal at the district court, the Government stated its investigation "will be a long and complicated one, and it is only the beginning." (CR 34). The Government has continued in its attempts to discover information about the ALA. In May 1980, the Government requested all information in an accountant's possession relating to "any other member of the American Law Asociation for whom you have performed accounting or tax services." (Exhibit 1 to hearing before Magistrate Sweigert, May 16, 1980). In subpoenas to other individuals, the Government requested "all documents and records relating to the American Law Association. . ." (Subpoena to Robert A. Austin, Exhibit 2 at hearing before Magistrate Sweigert, May 16, 1980). In July, 1980, the Government filed a "Status Report Regarding Subpoenas" and an "Amended Status Report Regarding Subpoenas" with the district court. (CR 50, 51). Each disclosed that as of July, subpoenas

were outstanding and additionally, other subpoenas to other banks had not been satisfied at that time. The above facts were presented to the Ninth Circuit in Petitioner's Memorandum in Opposition to Appellees' Motion to Dismiss.

After Petitioner's brief on the First Amendment issue was filed with the Ninth Circuit, the Government, without filing its Appellees' brief, moved to dismiss the appeal as moot. The Ninth Circuit granted the Government's motion without hearing and without opinion on February 4, 1980. (Appendix A).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE "CAPABLE OF REPETITION YET EVADING REVIEW" EXCEPTION TO THE MOOTNESS DOCTRINE.

This court has refused to dismiss as moot, cases in which the controversy is one "capable of

repitition, yet evading review". Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, (1911). This principle was further clarified in Weinstein v. Bradford, 423 U.S. 147, (1975), as precluding a dismissal for mootness when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

The Ninth Circuit Order dismissing the appeal was filed without opinion. (Appendix A). The Order cites, without further explanation, Securities & Exchange Comm'n v. Laird, 598 F.2d 1162 (9th Cir. 1979). Because Petitioner argued the actions of the Government were "capable of repitition, yet evading review", it can only surmise the court rejected this exception to the law of mootness as applied to the facts of the case.

In so holding, the Ninth Circuit's implicit rejection directly conflicts with the Seventh Circuit's interpretation of this principle in In Re Special April 1977 Grand Jury, (Scott), 581 F.2d 589 (7th Cir. 1978)

which involved facts identical to those herein.

In Scott, Federal Grand Jury subpoenas were served on staff members of the Attorney General for Illinois, William Scott. The District Court denied Scott's motion to quash the subpoenas and denied any stay pending appeal, as did the Seventh Circuit and this Court. Subsequently, the staff members complied with the subpoenas. On appeal, the Seventh Circuit denied government claims that the issues raised were moot because of compliance. It held that the case was justiciable because the controversy was "capable of repetition yet evading review." Both elements of the Weinstein standard were met in that: (1) the dates imposed for subpoena compliance were too short to allow their litigation fully prior to compliance; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again because the subpoenas were part of a continuing investigation, and future subpoenas, subject to the same objection (mootness), were likely. 581 F.2d at 591. The Seventh Circuit further opined that this Court has

not required parties to refuse subpoena compliance and appeal "a subsequent finding of contempt." Id., at 591.

The facts and procedural posture of the instant case are virtually identical to those found determinative in Scott. (1) The dates required for compliance with the subpoenas served on the banks demanding confidential association records were too short to allow their litigation fully prior to compliance. (2) There is a reasonable expectation that the Association will be subjected to the same action again because, as in Scott, the subpoenas are part of an admittedly long-term investigation with the expectancy of additional subpoenas.

Despite the symmetry with Scott, the Ninth Circuit, without explanatory opinion, dismissed the Petitioner's appeal as citing Laird. This reliance is open to serious question.

In Laird, a corporation and certain individuals resisted government subpoenas. While, on appeal, all requested documents and testimony were voluntarily given the Government by the parties challenging the

subpoenas. The court, without addressing the "capable of repetition" exception to the mootness doctrine, properly held the case moot. Id. at 1163.

Laird is factually inapposite to the instant case. In Laird, the subpoenaed parties both moved to quash and voluntarily relinquished the challenged material. Here the information subpoenaed was in the hands of third party banks; neutral parties and heavily regulated by the government. As such the banks had no interest in the matter and could not be expected to refuse compliance.

This distinction between voluntary compliance of the party challenging the subpoenas and a third party with no interest was considered determinative in United States v. Arthur Andersen & Co., 623 F.2d 725 (1st Cir. 1980). In that case, an Internal Revenue Service summons was served on an accounting firm requiring production of workpapers of a client undergoing a tax investigation. Arthur Andersen, and not the taxpayer, challenged the summons. As in Scott and the instant case, the accounting firm's request for a stay pending appeal was denied by both the

district and appeals court. The accounting firm subsequently complied with the summons pending appeal.

On appeal, the First Circuit equated a civil summons to a subpoena and expressly distinguished Scott holding the controversy was moot and not "capable of repetition yet evading review". The court stated:

> "... the case [Scott] is distinguishable in one important aspect. The grand jury subpoenas at issue were directed at members of the appellant's staff, not the appellant himself. It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply. Cf. Perlman v. United States, 247 U.S. 7 (1918) (interlocutory appeal from discovery order permitted when order directed to person other than appellant who has insufficient incentive to risk contempt.)" At 723.

Thus, in a controversy involving nearly identical facts to Scott, the Ninth Circuit has reached an opposite result. Indeed, after Petitioner argued to the Ninth Circuit that the Scott case precludes dismissal due to mootness, the Government replied, "We submit that Scott was incorrectly decided and

should not be applied by this Court" (Appellees' Response to Appellant's Opposition to Motion to Dismiss Appeal).

Petitioners could find only two other cases involving mootness when a third party complied with an IRS summons. In United States v. Deak-Perera International Banking Corp., 610 F.2d 89 (2d. Cir. 1979) the court dismissed as moot an appeal when the third party voluntarily complied with a summons. There was no mention of an ongoing investigation. The Ninth Circuit has apparently reconfirmed its position in United States v. Silva and Silva Accountancy Corp., 47 AFTR 2d 81-1270 (9th Cir. Cause No. 80-5497, March 20, 1981). In a two paragraph opinion, the Ninth Circuit dismissed as moot a challenge to a summons when the third party accountant voluntarily relinquished the taxpayer's records. There was again no mention of an ongoing investigation.

In conclusion, the dismissal by the Ninth Circuit crystalizes a conflict between the circuits on this point: The Ninth and Seventh have taken oppos-

ite positions, the First apparently supports the Seventh, and the Second apparently supports the Ninth.

2. THE DECISION BELOW ERRED IN DECIDING A SIGNIFICANT CONSTITUTIONAL QUESTION BY HOLDING THAT THE GOVERNMENT SUBPOENAS IN THIS MATTER DEMANDING CONFIDENTIAL ASSOCIATION MEMBERSHIP AND FINANCIAL INFORMATION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS.

Petitioner's submit that the question of mootness cannot be isolated from the nature of the challenge to the grand jury subpoenas. The subpoenas are not challenged on merely technical grounds as relevancy or undue burden. The are challenged because they violate the Association's First Amendment rights.

This Court has recognized these freedoms are "delicate and vulnerable, as well as supremely precious" in NAACP v. Button, 371 U.S. 415 (1963). In Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), a case dealing with legislative subpoenas issued to compel membership lists of the

NAACP in Florida, this Court recognized that compulsory process must be subordinated to the requirements of the First Amendment.

> "To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights; to impose a lesser standard than we here do would be inconsistent with the maintenance of those essential conditions basic to the preservation of our democracy." 372 U.S. at 558.

Petitioners urge this Court to decide the constitutional issue now. There is no benefit to remanding the case to the Court of Appeals as the entire record consists of affidavits; one by a government attorney, several by Association members. The constitutional conclusion must flow from these and, the correctness of the district court decision is open to serious doubt.

An association posseses standing to assert the First Amendment rights of its members. NAACP v. Alabama, 357 U.S. 449 (1958). The ALA has standing to quash a subpoena issued to a third party financial

institution which would reveal membership lists and financial records of the Association. Pollard v. Roberts, 283 F.Supp. 248 (E.D. Ark. 1968), aff'd per curiam, 393 U.S. 14 (1968). It is settled that membership lists of organizations are protected from compulsory disclosure by the First Amendment right of association when the membership list itself is not relevant to the purpose of the investigation. NAACP v. Alabama.

Even Grand Juries must bow to the First Amendment. In Branzburg v. Hayes, 408 U.S. 665 (1972), this Court dealt with the claimed First Amendment freedom of reporters to protect sources. In its opinion, the Court stated:

> "Grand Juries are subject to judicial control and subpoenas to motion to quash. We do not expect courts will forget that Grand Juries must operate within the limits of the First Amendment..." Id. at 708.

An asserted First Amendment claim does not in itself put information beyond the reach of the government. Instead a balance must be struck. When grand jury investigations collide with First Amend-

ment rights, the burden shifts to the government to establish its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights are not greater than is essential to vindicate its subordinating interests. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). As stated in Bursey, when grand jury subpoenas infringe on First Amendment rights, the government must show that "there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation." Id. at 1083. The government must also demonstrate that the "means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest." Id.

In the case before the court, it is uncontraverted that the subpoenaed material will reveal membership lists of the American Law Association. It is uncontraverted that the members of the American Law Association have been harassed by agents of the Internal Revenue Service. The only justification provided by the government to secure this informa-

tion is that the material might show that certain officers of the American Law Association "may" have committed certain crimes. This justification is inadequate when compared to other decisions balancing First Amendment rights against the government's need to know. See Bursey, supra, Pollard, supra, Gibson, supra, and Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978). In the above cases, in balancing the need to know against the First Amendment, a more cogent showing for the production of the records was demonstrated than by the government here, yet the records were ordered not to be produced.

It is not contended that a First Amendment claim is an absolute bar. But when the First Amendment is raised, the government must demonstrate that there is a "substantial possibility that the information sought will expose criminal activity." Particularly in the instant case, because the government already has obtained blind records (signature cards and statements of account) from each bank subpoenaed, the government must demonstrate that the comprehensive subpoenas which will disclose membership

lists will expose criminal activity.

In the proceeding below, the government failed to address the further Bursey requirement that the government demonstrate the information sought could not be obtained by less burdensome means.

The proper approach to acquire the information sought by the government is outlined in United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980). A civil summons was issued by the Internal Revenue Service to a bank requesting all records of an officer of the United States Taxpayer Union. The information requested was virtually identical to that requested by the subpoenas challenged herein. The United States Taxpayer Union intervened in the administrative summons and moved it be quashed under the First Amendment because the bank records would reveal membership lists of the Union. The government resisted asserting that its summons was issued in good faith for a proper purpose. The Eighth Circuit, in reversing the trial court, decided the government failed to meet the burden of showing a need for the material.

Despite the failure, the court suggested how the government might proceed. It proposed a "step by step" approach whereby the government would first seek bank statements and other "blind" records indicating the status of the United States Taxpayers Union account. It suggested, if more information was needed to obtain a true picture of the taxpayers' finances, subsequent summons could be issued each seeking increasingly detailed information. The court opined that if discrepancies were discovered, the government might be able to make the "cogent and compelling" showing needed to obtain the entire set of bank records, including the documents identifying USTU members.

In view of Citizens State Bank, the government's omission is significant here. It had in its possession at the time it issued the second set of subpoenas, statements of account which are the blind records mentioned by the Eighth Circuit. However, even with these blind records in its possession, the government made no showing other than the unsupported allegation that the officers "may" have com-

mitted crimes.

The government's showing falls short of the required justification for producing material protected by the First Amendment.

Should the government's contentions be accepted as sufficient by this Court, any prosecutor, state or federal, could make this allegation, "I have reasons to believe that Mr. X, with signatural powers over an organization's bank account may have committed a tax crime" and obtain membership lists and financial information of the organization. Petitioners believe the First Amendment means more than this.

And, lastly, disclosing financial information of the Association is as much a violation of the Petitioner's First Amendment rights as is disclosure of the Association's membership lists. As the court stated in Bursey:

> "[t]o require a member of an association, especially a dissident political party, to reveal the details of its funding is as effective a chilling device as is compulsory disclosure of its membership lists." 466 F.2d at 1088.

It is uncontraverted that the subpoenas herein would garner confidential financial information of the Association. The government has made no cogent showing herein as to its need for this information. The district court's conclusion that no First Amendment rights are violated is not justified.

CONCLUSION

For the foregoing reasons, Petitioner, American Law Association, respectfully urges that this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted to resolve the conflict which has arisen among the Circuits. It furthermore requests the Court to resolve the issue of the violation of Petitioner's First Amendment rights.

Respectfully submitted,

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Dated: May 4, 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN LAW ASSOCIATION, an unincorporated association, Plaintiff-Appellant, vs. JOHN MERKEL, in his capacity as United States Attorney for the Western District of Washington, Defendant-Appellee.	NO. 80-3185 CV 80-329 WTM O R D E R

Filed: February 4, 1981

Before: TANG and CANBY, Circuit Judges

Upon due consideration, the court issues the following order:

1. Appellant's motion for an extension of time to respond to appellee's motion to dismiss is granted, and the opposition, heretofore received, is ordered filed;

2. Appellee's motion to dismiss this appeal as moot is granted, and the appeal is hereby dismissed, see Securities & Exchange Comm'n v. Laird, 598 F.2d 1162 (9th Cir. 1979); and

3. Appellee's motion for an extension of time to file its answering brief in this appeal is denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN LAW ASSOCIATION, Plaintiff, v. JOHN C. MERKEL, et al., Defendants.	C80-329M
AMERICAN LAW EDUCATIONAL SOCIETY, et al., Plaintiffs, v. INTERNAL REVENUE SERVICE, et al., Defendants.	C80-445M
IN RE THE GRAND JURY SUBPOENA DUCES TECUM ADDRESSED TO RAINIER NATIONAL BANK AND SEATTLE TRUST AND SAVINGS BANK SEEKING PRODUCTION OF BANKING RECORDS OF THE AMERICAN LAW EDUCATIONAL SOCIETY MASTER-PLAN TRUST, N.W. DIAMOND FINANCIAL SERVICES AND R. BRUCE RIPLEY	MS80-101 REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY OF CONCLUSION

The Federal Grand Jury in this district issued subpoenas duces tecum ordering several banks to produce financial records of certain customer accounts. All of

the subpoenas were served by special agents of the Internal Revenue Service and provide that the banks will be considered to have complied with the subpoenas by their delivering the requested documents to the special agent serving the subpoena, or by mailing them to the "United States Attorney, Attn: David H. Beitz."

Plaintiffs, American Law Association ("ALA"), American Law Education Society ("ALES"), and R. Bruce Ripley and Doris Ripley moved to quash the subpoenas and/or for injunctive relief, to prevent the financial records requested from being turned over either to the grand jury or to the government officials identified in the subpoenas. Their primary claim is that production of the financial records will disclose the identity of the membership of the associations in violation of their First Amendment rights of association. They also argue, however, that even if the documents may be required by the grand jury, the particular subpoenas involved here violate the Right to Financial Privacy Act, 12 USC §3420, because they permit the banks to deliver the documents in a manner other than directly to the grand jury.

In C80-329M, ALA moved to quash subpoenas issued

to the First Bank of Snook, Snook, Texas, to Seattle Trust and Savings Bank, Redmond, Washington, and to Rainier National Bank, Midlakes Office, Bellevue, Washington.

In C80-445M, subpoenas issued to Seattle Trust and to Rainier National Banks are also involved, but in that case ALES and Bruce Ripley and Doris Ripley seek a temporary restraining order against the Internal Revenue Service ("IRS") and Special Agents Jensen and Brown to restrain them "from proceeding with" the subpoenas. These same plaintiffs also filed MS80-101 alternatively seeking to quash the subpoenas.

All of the subpoenas were originally returnable on May 6, 1980, but the parties stipulated to continue the return dates to May 20, 1980, in order to permit the cases to be adequately briefed and argued. Because the three cases involve identical issues, a consolidated hearing was held on May 6, 1980, at which the court considered the memoranda and affidavits submitted and heard oral argument.

For the reasons set forth hereinafter, I recommend that the motions be denied in all respects.

DISCUSSION AND ANALYSIS OF AUTHORITIES

On January 28, 1980, a grand jury investigation of Karl L. Dahlstrom, R. Bruce Ripley, Hiram E. Conley, Gaze Durst, and David J. Morris, was commenced in this district. Counsel for the government in these cases, David H. Beitz, is the attorney conducting the grand jury proceedings. He advises that the agents who served the subpoenas were acting as agents of the grand jury.

The investigation seeks to explore possible violations of 26 USC §7201 (attempt to evade taxes), 26 USC §7206(1) (subscribing returns known to be false), 26 USC §7206(2) (aiding and assisting others in preparing false tax returns), and 18 USC §371 (conspiracy to unlawfully impede and impair the lawful functions of the Internal Revenue Service ("IRS")).

IRS suspects that those who are the focus of the investigation are engaged in a promotional scheme involving ALA and ALES in which individuals pay for tax advice involving the establishment of overlapping and interlocking foreign trusts through which American taxpayers attempt to transfer income in a manner which appears to return it in tax free transactions but which the government suspects are "sham tax dodges."

The subpoena to First Bank of Snook, Snook, Texas, seeks all financial records for accounts in the name of "Trust Publications," "Karl L. Dahlstrom, Trust Publications," and any other accounts involving Dahlstrom or his dba's, during certain specific time periods.

The subpoena to Seattle Trust seeks all financial records for the account of ALES from September 14, 1977 to December 31, 1979.

The subpoena to Rainier National Bank seeks financial records for a "Masterplan Trust" account, an ALES account, a "N.W. Diamond Financial Service" account and any other accounts in which R. Bruce Ripley was a signatory authority all for certain specific time periods.

Messrs. Dahlstrom, Conley, and Ripley have submitted affidavits which essentially state that the ALA and ALES are unincorporated membership associations interested in tax change, that they and other members of these associations have been harassed by IRS, and that disclosure of the records of the various accounts would, in essence identify most of the members of these associations - that such identification would, because of past harassment, have a "chilling effect" on the membership.

(1) First Amendment Claims.

The First Amendment right of free association reaches within the closed doors of the grand jury, and when such right is validly asserted, the burden shifts to the government to demonstrate a "compelling interest" sufficient to outweigh the possibility of infringement. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

Assuming the ALA and ALES have sufficiently established that compliance with the subpoenas would burden the right of association because disclosure of the records sought would reveal most of their membership, and that they have further established adverse consequences to members because of a potential for harassment, see Buckley v. Valeo, 424 U.S. 1 (1976), I believe that the government has met its burden of establishing that it has an immediate and compelling interest in the subject of the investigation and that there is a substantial connection between the financial records sought and the crimes under investigation.

The grand jury investigation into violations of the tax laws of the United States is focused on several named individuals and in order to determine whether illegal tax evasion schemes are being promoted and carried out by them, a complete and full picture of their

financial dealings will be required. Under the circumstances, the incidental effect on membership must give way.

Plaintiffs argue that the government has not met its burden and rely primarily on Bursey v. United States, supra.

However the facts in Bursey are clearly distinguishable. In Bursey, the grand jury was investigating threats against the President of the United States alleged to have been made by members of the Black Panther Party. The court held that the government had failed to show any connection between the questions put to members of the staff of the party newspaper and any possible crime under investigation and therefore struck the balance in favor of First Amendment rights. Here, specific individuals who at various times have had signatory control over ALA and ALES accounts are being investigated for possible tax law violations arising out of financial transactions allegedly involving ALA and ALES. The government need not establish that crimes have been committed to justify the investigation, all it need establish is a substantial possibility that the records sought may establish such crimes Bursey v. United

States, supra.

In sum, there is no showing that the grand jury is seeking to expose for the sake of exposure, as in NAACP v. Alabama, 357 U.S. 449 (1957). Instead, the record reflects an investigation of specific individuals suspected of criminal tax violations and the financial records requested are clearly necessary to that investigation.

(2) Right to Financial Privacy Act.

Section 3414(1) of the Right to Financial Privacy Act, 12 USC §3401 et seq., provides as follows:

> "Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpoena or court order issued in connection with proceedings before a grand jury."

Section 3420 provides:

> "Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury -
>
> "(1) shall be returned and actually presented to the grand jury;
> "(2) shall be used only for the purpose of considering whether to issue an indictment or presentment by the grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure;
> "(3) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and,

> "(4) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure."

Plaintiffs contend that the subpoenas in the instant case which allows the banks to comply either by delivering the records to the IRS agent serving the subpoena or by mailing the records to the government attorney handling the grand jury proceeding, violate §3420(1).

Plaintiffs argue that §3420(1) requires bank officers to appear in person before the grand jury and present the records. I do not believe the language requires such conclusion, and the practical problems posed for grand jury proceedings would suggest such interpretation is too literal. Although the documents must actually be returned and presented to the grand jury and be maintained in accordance with §3420 and F. R. Cr. Proc. 6(e), the language does not necessarily require return and presentation by the bank. The subpoenas issued under the authority of the grand jury authorize the agents serving the subpoenas or the government attorney to receive the documents for the grand jury. Such agents are subject to

all of the handling requirements provided in §3420 and in rule 6(e). Delivery of documents to agents of the grand jury is acceptable grand jury procedure, United States v. Duncan, 598 F.2d 839 (4th Cir. 1979), and §3420 does not compel a contrary result.

CONCLUSION

The motions to quash and for injunctive relief should be denied and the subpoenas enforced without modification. The government has agreed to continue the grand jury proceeding to June 3, 1980. Any objections to, or memoranda in support of the Report and Recommendation should be filed and served by May 30, 1980. If the court deems further oral argument is necessary, it will so advise the parties.

A proposed form of order accompanies this Report and Recommendation.

DATED this 19th day of May, 1980.

/s/ Philip K. Sweigert
United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN LAW ASSOCIATION, Plaintiff, v. JOHN C. MERKEL, et al., Defendants.	C80-329M
AMERICAN LAW EDUCATIONAL SOCIETY, et al., Plaintiffs, v. INTERNAL REVENUE SERVICE, et al., Defendants.	C80-445M
IN RE THE GRAND JURY SUBPOENA DUCES TECUM ADDRESSED TO RAINIER NATIONAL BANK AND SEATTLE TRUST AND SAVINGS BANK SEEKING PRODUCTION OF BANKING RECORDS OF THE AMERICAN LAW EDUCATIONAL SOCIETY MASTER-PLAN TRUST, N.W. DIAMOND FINANCIAL SERVICES AND R. BRUCE RIPLEY	MS80-101 ORDER DENYING MOTIONS TO QUASH AND FOR TEMPORARY RESTRAINING ORDER

The court has reviewed the motions to quash grand jury subpoenas and/or for injunction, the supporting and opposing affidavits, the memoranda of the parties, the

Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the file herein,

It is hereby ORDERED:

(1) Said Report and Recommendation is hereby approved and adopted;

(2) Plaintiff American Law Association's Motion to Quash Grand Jury Subpoenas in No. C80-329M is DENIED;

(3) Plaintiffs American Law Education Society and R. Bruce Ripley and Doris Ripley's Motion for Temporary Restraining Order in No. C80-445M and Motion to Quash Grand Jury Subpoenas in No. MS 80-101 are DENIED;

(4) The Clerk of Court is directed to forward uncertified copies of this Order to counsel for the parties and to United States Magistrate Philip K. Sweigert.

DATED this 28th day of May, 1980.

/s/ Walter T. McGovern
CHIEF UNITED STATES DISTRICT COURT

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2032

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN LAW ASSOCIATION, PETITIONER

v.

JOHN MERKEL, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

LAWRENCE G. WALLACE
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TABLE OF AUTHORITIES

Page

Cases:

Branzburg v. *Hayes*, 408 U.S. 665 5

Buckley v. *Valeo*, 424 U.S. 1 5

Doe v. *Bolton*, 410 U.S. 179 4

Grand Jury Proceedings Witness Bardier, In re, 486 F. Supp. 1203 5

Kurshan v. *Riley*, 484 F. 2d 952 3

Laird v. *Tatum*, 408 U.S. 1 5

NAACP v. *Alabama*, 357 U.S. 449 5

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 4

North Carolina v. *Rice*, 404 U.S. 244 ..... 3, 5

Preiser v. *Newkirk*, 422 U.S. 395 ..... 3, 5

Roe v. *Wade*, 410 U.S. 113 4

SEC v. *Laird*, 598 F. 2d 1162 ..... 3, 4

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 4

Special April 1977 Grand Jury, In re, 581 F. 2d 589, cert. denied, 439 U.S. 1046 3

United States v. *Arthur Andersen & Co.*, 623 F. 2d 720, cert. denied, No. 80-311 (Dec. 1, 1980) 3

United States v. *Deak-Perera Int'l Banking Corp.*, 610 F. 2d 89 3

Page

Cases—Continued:

United States v. *Frumento*, 552 F. 2d 534 4

United States v. *Hankins*, 565 F. 2d 1344, clarified on other grounds and rehearing denied, 581 F. 2d 431, cert. denied, 440 U.S. 909 3

United States of America, Etc., In re, 610 F. 2d 1148 4

United States v. *New York Telephone Co.*, 434 U.S. 159 4

United States v. *Olson*, 604 F. 2d 29 3

United States v. *Patmon*, 630 F. 2d 458 3

Weinstein v. *Bradford*, 423 U.S. 147 4

Constitution and statutes:

United States Constitution, First Amendment 2, 5

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7201 2
Section 7206(1) 2
Section 7206(2) 2

18 U.S.C. 371 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of an order of the court of appeals dismissing as moot its appeal from the district court's denial of its motions to quash certain subpoenas issued by a federal grand jury.

The pertinent facts may be summarized as follows: On January 28, 1980, a grand jury investigation of Karl L. Dahlstrom, R. Bruce Ripley, Hiram E. Conley, Gaze Durst and David J. Morris was commenced in the Western District of Washington (Pet. App. 4B). Pursuant to this investigation, certain subpoenas were issued to various financial institutions for their records pertaining to transactions of these individuals and their closely related organizations (Pet. App. 5B).

On April 28 and May 7, 1980, petitioner, an unincorporated association of which Dahlstrom, Ripley and Conley were members, moved to quash these subpoenas on the ground that production of the requested information would violate the First Amendment rights of its members (A. 28-29).[1] In an affidavit filed in response to the motions, the government attorney conducting the investigation stated that the grand jury was investigating possible violations of Sections 7201, 7206(1), and 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) and 18 U.S.C. 371 by Dahlstrom and others, and that the information subpoenaed was relevant to the determination of whether the crimes under investigation had been committed (A. 64-66).

On May 19, 1980, following a hearing on petitioner's motion to quash, a magistrate recommended that the motions be denied (Pet. App. 1B-10B), and on May 28, 1980 the district court denied petitioner's motions to quash (Pet. App. 11B-12B). On June 2, 1980, the court denied petitioner's motion for an injunction barring compliance with the subpoenas pending appeal (A. 94). On the same date, the court of appeals denied petitioner's motion for an injunction pending appeal, and shortly thereafter, denied petitioner's motion for reconsideration. The financial institutions thereupon fully complied with the subpoenas. After compliance, the court of appeals granted the government's motion to dismiss as moot petitioner's appeal (Pet. App. 1A-2A). The grand jury subsequently returned an indictment against Dahlstrom, Ripley, Conley, Durst and Morris (CR 81-116R, Western District of Washington at Seattle), and the grand jury investigation was terminated.

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[1] "A." refers to the separately bound excerpts of the record filed by petitioner in the court of appeals.

1. Petitioner contends (Pet. 9-16) that the court of appeals erred in dismissing its appeal as moot even though the financial institutions' compliance with the subpoenas removed the only issue in this case. But, as this Court recently observed, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' " *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Here, the subpoenas sought production of certain documents. Upon the district court's denial of petitioner's motions to quash, and subsequent denials by the district court and the court of appeals of petitioner's applications for injunctions pending appeal, those documents were produced. Accordingly, the court below correctly held that there is no longer a live dispute between petitioner and the government, and that the case was moot. See *United States* v. *Arthur Andersen & Co.*, 623 F. 2d 720 (1st Cir. 1980), cert. denied, No. 80-311 (Dec. 1, 1980); *United States* v. *Deak-Perera Int'l Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir.), clarified on other grounds and rehearing denied, 581 F. 2d 431 (1978), cert. denied, 440 U.S. 909 (1979); *United States* v. *Patmon*, 630 F. 2d 458 (6th Cir. 1980); *United States* v. *Olson*, 604 F. 2d 29 (8th Cir. 1979); *SEC* v. *Laird*, 598 F. 2d 1162 (9th Cir. 1979).

2. Contrary to petitioner's contention (Pet. 15), the court's order in this case does not sufficiently "crystalize" a conflict with *In re Special April 1977 Grand Jury* (appeal of William J. Scott), 581 F. 2d 589 (7th Cir.), cert. denied, 439 U.S. 1046 (1978), to warrant review by this Court. In *Scott*, the court concluded that a challenge to certain federal grand jury subpoenas by the subject of the investigation was not moot, even though there had been full compliance prior to

consideration of the appeal. As the court saw the matter, the controversy was capable of repetition yet evading review because further subpoenas would likely be issued by that grand jury, and the period of time between the district court's order enforcing the subpoenas and compliance by the subpoenaed parties was too short to allow the action to be fully litigated.[2] The court accordingly affirmed the denials of the motion to quash. Although we believe that *Scott* wrongly concluded that the case was not moot (see Memorandum for the United States in Opposition in *William J. Scott, Attorney General of Illinois* v. *United States of America*, No. 78-403, 1978 Term, at 2-3 n.3), the court there did not speak to the basic principles of mootness applied by the other courts of appeals in cases such as *SEC* v. *Laird, supra* (see page 3, *supra*). Since it is unclear whether the Seventh Circuit would hold that the instant case was not moot, review by this Court is not warranted at this time.

At all events, *Scott* is distinguishable on its facts. There, the grand jury was conducting a continuing investigation and it was possible to conclude that the issue was capable of repetition. Here, on the other hand, the grand jury investigation has been terminated. It is therefore unlikely that there could be a repetitious demand for information pertaining to petitioner's financial affairs. Moreover, to the extent that there was ever any threat of harm to petitioner's rights, that harm has occurred, and any resolution by this Court of the asserted conflict "cannot affect the rights of

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[2]Cf. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). See also *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973); *United States* v. *Frumento*, 552 F. 2d 534, 536-541 (3d Cir. 1977) (en banc); *In re United States of America, Etc.*, 610 F. 2d 1148 (3d Cir. 1979).

[the] litigants in" this case. Compare *Preiser* v. *Newkirk*, *supra*, 422 U.S. at 401-402; *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[3]Petitioner's request (Pet. 17) that the case be decided on the merits is inappropriate. The court of appeals did not address the merits of petitioner's First Amendment argument. The court simply dismissed the appeal as moot, and it is the mootness question as to which petitioner seeks certiorari.

Moreover, there is no basis for petitioner's claim (*ibid.*) that the federal grand jury should be barred, on First Amendment grounds, from inquiring into the possible existence of criminal activity by its members. It is true that federal grand juries must "operate within the limits of the First Amendment" in conducting their investigations. *Branzburg* v. *Hayes*, 408 U.S. 665, 708 (1972). Petitioner has failed, however, to demonstrate that issuance of the subpoenas under scrutiny here violated the First Amendment rights of its members. The affidavits (A. 4-5, 30, 54) fall far short of demonstrating that enforcement of the subpoenas presented a substantial, objective threat to the First Amendment rights of its members. Compare *NAACP* v. *Alabama*, 357 U.S. 449, 462-463 (1958). See *Buckley* v. *Valeo*, 424 U.S. 1, 69-73 (1976); *Laird* v. *Tatum*, 408 U.S. 1, 10-16 (1972); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1211 (D. Nev. 1980).

Finally, petitioner's suggestion (Pet. 20-23) that the government has not made a sufficient showing of need for the subpoenaed information ignores the fact that there was a full hearing on that issue before the magistrate. In a report and recommendation adopted by the district court, the magistrate found that the grand jury was conducting a legitimate investigation into the promotion of possibly illegal tax evasion schemes by named individuals, and that the government had satisfied its burden of proving that it "has an immediate and compelling interest in the subject of the investigation and that there is a substantial connection between the financial records sought and the crimes under investigation" (Pet. App. 5B-8B).

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AMERICAN LAW ASSOCIATION,
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PETITIONER,

vs.

JOHN MERKEL, ETC., et al,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-2032

AMERICAN LAW ASSOCIATION,
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PETITIONER,

vs.

JOHN MERKEL, in his capacity as
United States Attorney for the
Western District of Washington, et al,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The pertinent facts in this matter are summarized in the Petition for a Writ of Certiorari.

In its Memorandum in Opposition, Respondents argue that because the grand jury investigation below

has been terminated, it is "unlikely" that there could be a reptitious demand for information pertaining to Petitioner's membership roster and financial affairs. (Memo in Opposition 4). When queried, counsel for Respondents could not give any assurance that there would be no further grand jury investigation of the American Law Association or of its members.

The circumstances of this case present a gross inequity between government and citizen which should not be condoned by the Court: if an organization challenges a grand jury subpoena issued to a neutral third party in violation of its First Amendment rights, loses before the trial court, and further fails to secure a stay pending appeal, all appeal rights will be lost if the third party complies with the subpoena. Furthermore, the government may at any time voluntarily terminate the grand jury investigation and claim, as it does here, the matter is not capable of repetition. On the other hand, should the government lose before the trial court it may appeal all the way to this Court, with the issue "ripe" at each stage of the appeal.

This is not equal justice. Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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August , 1981